

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CHRISTOPHER L. LIPPERT,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security
Administration,

Defendant.

NO: 12-CV-0191-TOR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment (ECF Nos. 17 and 19). Plaintiff is represented by Jeffrey Schwab. Defendant is represented by Gerald J. Hill. This matter was submitted for consideration without oral argument. The Court has reviewed the administrative record and the parties' completed briefing and is fully informed. For the reasons discussed below, the Court grants Defendant's motion and denies Plaintiff's motion.

1 JURISDICTION

2 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 405(g);
3 1383(c)(3).

4 STANDARD OF REVIEW

5 A district court's review of a final decision of the Commissioner of Social
6 Security is governed by 42 U.S.C. § 405(g). The scope of review under §405(g) is
7 limited: the Commissioner's decision will be disturbed "only if it is not supported
8 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
9 1158-59 (9th Cir. 2012) (citing 42 U.S.C. § 405(g)). "Substantial evidence" means
10 relevant evidence that "a reasonable mind might accept as adequate to support a
11 conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently,
12 substantial evidence equates to "more than a mere scintilla[,] but less than a
13 preponderance." *Id.* (quotation and citation omitted). In determining whether this
14 standard has been satisfied, a reviewing court must consider the entire record as a
15 whole rather than searching for supporting evidence in isolation. *Id.*

16 In reviewing a denial of benefits, a district court may not substitute its
17 judgment for that of the Commissioner. If the evidence in the record "is
18 susceptible to more than one rational interpretation, [the court] must uphold the
19 ALJ's findings if they are supported by inferences reasonably drawn from the
20 record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district

1 court “may not reverse an ALJ’s decision on account of an error that is harmless.”
2 *Id.* at 1111. An error is harmless “where it is inconsequential to the [ALJ’s]
3 ultimate nondisability determination.” *Id.* at 1115 (quotation and citation omitted).
4 The party appealing the ALJ’s decision generally bears the burden of establishing
5 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

6 FIVE-STEP SEQUENTIAL EVALUATION PROCESS

7 A claimant must satisfy two conditions to be considered “disabled” within
8 the meaning of the Social Security Act. First, the claimant must be “unable to
9 engage in any substantial gainful activity by reason of any medically determinable
10 physical or mental impairment which can be expected to result in death or which
11 has lasted or can be expected to last for a continuous period of not less than twelve
12 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be
13 “of such severity that he is not only unable to do his previous work[,] but cannot,
14 considering his age, education, and work experience, engage in any other kind of
15 substantial gainful work which exists in the national economy.” 42 U.S.C. §
16 1382c(a)(3)(B).

17 The Commissioner has established a five-step sequential analysis to
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
19 404.1520(a)(4)(i)-(v); 416.920(a)(4)(i)-(v). At step one, the Commissioner
20 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);

1 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
2 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
3 404.1520(b); 416.920(b).

4 If the claimant is not engaged in substantial gainful activities, the analysis
5 proceeds to step two. At this step, the Commissioner considers the severity of the
6 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the
7 claimant suffers from “any impairment or combination of impairments which
8 significantly limits [his or her] physical or mental ability to do basic work
9 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);
10 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
11 however, the Commissioner must find that the claimant is not disabled. *Id.*

12 At step three, the Commissioner compares the claimant’s impairment to
13 several impairments recognized by the Commissioner to be so severe as to
14 preclude a person from engaging in substantial gainful activity. 20 C.F.R. §§
15 404.1520(a)(4)(iii); 416.920(a)(4)(iii). If the impairment is as severe or more
16 severe than one of the enumerated impairments, the Commissioner must find the
17 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

18 If the severity of the claimant’s impairment does meet or exceed the severity
19 of the enumerated impairments, the Commissioner must pause to assess the
20 claimant’s “residual functional capacity.” Residual functional capacity (“RFC”),

1 defined generally as the claimant's ability to perform physical and mental work
2 activities on a sustained basis despite his or her limitations (20 C.F.R. §§
3 404.1545(a)(1); 416.945(a)(1)), is relevant to both the fourth and fifth steps of the
4 analysis.

5 At step four, the Commissioner considers whether, in view of the claimant's
6 RFC, the claimant is capable of performing work that he or she has performed in
7 the past ("past relevant work"). 20 C.F.R. §§ 404.1520(a)(4)(iv);
8 416.920(a)(4)(iv). If the claimant is capable of performing past relevant work, the
9 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
10 404.1520(f); 416.920(f). If the claimant is incapable of performing such work, the
11 analysis proceeds to step five.

12 At step five, the Commissioner considers whether, in view of the claimant's
13 RFC, the claimant is capable of performing other work in the national economy.
14 20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a)(4)(v). In making this determination,
15 the Commissioner must also consider vocational factors such as the claimant's age,
16 education and work experience. *Id.* If the claimant is capable of adjusting to other
17 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
18 404.1520(g)(1); 416.920(g)(1). If the claimant is not capable of adjusting to other
19 work, the analysis concludes with a finding that the claimant is disabled and is
20 therefore entitled to benefits. *Id.*

1 The claimant bears the burden of proof at steps one through four above.
2 *Lockwood v. Comm’r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010). If
3 the analysis proceeds to step five, the burden shifts to the Commissioner to
4 establish that (1) the claimant is capable of performing other work; and (2) such
5 work “exists in significant numbers in the national economy.” 20 C.F.R. §§
6 404.1560(c); 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

7 ALJ’S FINDINGS

8 Plaintiff filed applications for disability insurance benefits and supplemental
9 security income disability benefits on April 20, 2009. Tr. 154-61. These
10 applications were denied initially and upon reconsideration and a hearing was
11 requested. Tr. 16. A hearing was held before an Administrative Law Judge on
12 December 17, 2010, in Wenatchee, Washington. Tr. 16-68. The ALJ issued a
13 decision denying Plaintiff benefits on January 14, 2011. Tr. 16-30.

14 At step one, the ALJ found that Plaintiff had not engaged in substantial
15 gainful activity since November 11, 2006, the alleged onset date. Tr. 19. At step
16 two, the ALJ found that Plaintiff had severe impairments consisting of
17 degenerative disc disease, posttraumatic stress disorder, and chronic alcoholism.
18 Tr. 19. At step three, the ALJ found that Plaintiff’s impairments did not meet or
19 medically equal a listed impairment. Tr. 19-20. With respect to Plaintiff’s residual
20 functional capacity, the ALJ found:

1 After careful consideration of the entire record, the undersigned finds
2 that, based on all of the impairments, including the substance use
3 disorders, the claimant has the residual functional capacity to perform
4 light work as defined in 20 CFR 404.1567(b) and 416.967(b) except
5 he would need a sit/stand option. He would be unable to climb
6 ladders, ropes, or scaffolding. He can occasionally climb stairs or
7 ramps. He can occasionally balance, stoop, kneel, crouch, and crawl.
8 He can have occasional contact with the public and coworkers. He
9 would be limited to one to three step tasks and he cannot perform
10 detailed work. He can handle occasional changes in the work setting.
11 The claimant would have unpredictable absences from work and he
12 would miss five or more days of work per month.

13 Tr. 20. At step four, the ALJ found that Plaintiff was unable to perform his past
14 relevant work. Tr. 21. At step five, the ALJ considered the Plaintiff's age,
15 education, work experience, and residual functional capacity, and concluded that
16 there are no jobs that exist in significant numbers in the national economy that the
17 Plaintiff could perform. Tr. 21. Thus, the ALJ concluded that Plaintiff was
18 disabled. *Id.*

19 Pursuant to 20 C.F.R. §§ 404.1535(b)(2) and 416.935(b)(2), the ALJ then
20 proceeded to a determination of whether Plaintiff's substance abuse disorders were
a contributing factor material to the earlier determination of disability, *i.e.*, whether
Plaintiff would still be considered disabled if he stopped using drugs or alcohol.
The ALJ concluded that, if Plaintiff stopped his substance abuse (1) he would
continue to have a severe impairment or combination of impairments; (2) that his
remaining impairments would not meet or medically equal a listed impairment; (3)
he would have the same residual functional capacity set forth above, except that he

1 would no longer have unpredictable absences from work and would no longer miss
2 five or more days of work per month; (4) he would continue to be unable to
3 perform past relevant work; and (5) that there would be a significant number of
4 jobs existing in the national economy that Plaintiff could perform. Tr. 22-29.
5 Thus, the ALJ found that Plaintiff's substance abuse disorder was a contributing
6 factor material to the prior disability determination and denied his claims on that
7 basis. Tr. 30.

8 The Appeals Council denied Plaintiff's request for review on February 12,
9 2012, making the ALJ's decision the Commissioner's final decision for purposes
10 of judicial review. Tr. 1-4; 20 C.F.R. §§ 404.981, 416.1484, and 422.210.

11 ISSUES

12 Plaintiff raises a single issue for review: whether substantial evidence
13 supports the ALJ's finding that Plaintiff would not be found to be disabled if he
14 stopped using alcohol. ECF No. 18 at 4-5.

15 DISCUSSION

16 Plaintiff appears to suggest that the ALJ erred by ignoring evidence that his
17 alcoholism is in remission. Specifically, Plaintiff asserts:

18 [T]he real question is whether the record supports a finding of
ongoing abuse of [alcohol]. The answer to that is a resounding "no."
19 A search of the entire record shows that [Plaintiff] has, in the past, had
a significant problem with ongoing alcohol use and some marijuana
20 use. But the record is equally clear that he has been sober when
evaluated by the psychologists on four separate occasions, he has been

1 in treatment for alcohol, and he has been reportedly sober with only
2 the most rare relapse. There is just not substantial evidence to support
3 a conclusion that the diagnoses and limitations assessed by the
4 psychologists who evaluated him should be thrown out because of the
5 sliver of evidence present regarding ongoing use. Yes, [Plaintiff] had
one well documented relapse and there is a suggestion that he may
have had another during the relevant period. But there is much more
evidence supporting ongoing sobriety and bona fide effort on his part
to maintain his sobriety.

6 ECF No. 18 at 6-7.

7 This argument fails for two reasons. First, the record contains ample
8 evidence of ongoing alcohol abuse during the claimed disability period. At the
9 hearing before the ALJ, Plaintiff testified that his driver's license was suspended in
10 2009 following a DUI citation. Tr. 44. Plaintiff was on probation for that offense
11 at the time of the hearing. Tr. 44. Plaintiff further testified that he received court-
12 ordered inpatient treatment for alcohol abuse at the James Oldham Treatment
13 Center the summer prior to the hearing. Tr. 45-46, 59. Thus, Plaintiff's own
14 admissions are sufficient to support a finding of ongoing alcohol abuse.

15 More importantly, however, Plaintiff's argument reflects a fundamental
16 misunderstanding of the relevant analysis. As the ALJ correctly determined, the
17 relevant question is whether Plaintiff's alcohol abuse was "material" to the initial
18 disability determination—*i.e.*, whether Plaintiff would still be found disabled based
19 solely upon his *non-alcohol-related* impairments. *See* 20 C.F.R. §§ 404.1535;
20 416.935. In performing this analysis, the ALJ must "evaluate which of [the

1 claimant's] current physical and mental limitations, upon which [the ALJ] based
2 [the] current disability determination, would remain if [the claimant] stopped using
3 drugs or alcohol[,] and then determine whether any or all of [the claimant's]
4 remaining limitations would be disabling." 20 C.F.R. §§ 404.1535(b)(2);
5 416.935(b)(2). In other words, once a claimant who abuses drugs or alcohol has
6 been found to be disabled, the ALJ must set all of the claimant's alcohol-related
7 impairments to one side and determine whether the remaining impairments are
8 sufficient to support a finding of disability.

9 After setting aside Plaintiff's alcohol-related impairments, the ALJ modified
10 Plaintiff's RFC to reflect the fact that he would no longer "have unpredictable
11 absences from work and . . . miss five or more days of work per month." Tr. 20,
12 23. The prior RFC remained the same in all other respects. Based upon that
13 adjusted RFC, the ALJ found that there are jobs existing in significant numbers in
14 the national economy that Plaintiff could perform. Tr. 29. Hence, the ALJ
15 concluded that Plaintiff's alcohol-related impairments were material to the initial
16 disability determination and denied Plaintiff benefits on that basis. Tr. 30.

17 Plaintiff has not challenged the ALJ's findings concerning his non-alcohol
18 related impairments. Having reviewed the entire record, the Court finds that those
19 findings are supported by substantial evidence. Accordingly, Defendant is entitled
20 to summary judgment.

IT IS HEREBY ORDERED:

1. Defendant's Motion for Summary Judgment (ECF No. 19) is

GRANTED.

2. Plaintiff's Motion for Summary Judgment (ECF No. 17) is **DENIED.**

3. The hearing on dispositive motions currently set for February 7, 2014, is

VACATED.

The District Court Executive is hereby directed to file this Order, enter Judgment for Defendant, provide copies to counsel, and **CLOSE** the file.

DATED August 22, 2013.



Thomas O. Rice
THOMAS O. RICE
United States District Judge